Office-Supreme Court, U.S.
FILED
FEB 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Petitioner,

v.

EVA REHNER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PALA BAND OF MISSION INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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January, 1983

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This brief is submitted with the written consent of all the parties.

Interest of the Pala Band of Mission Indians

The Pala Band of Mission Indians is a federally-recognized Band of Indians, located on a federally-created Reservation in San Diego County, California. Approximately 350 members reside on the 11,565 acre Reservation. The Pala Band, as authorized by 18 U.S.C. § 1161, has chosen to allow the consumption and sale of alcoholic beverages on its reservation. Alcoholic beverages are regulated under an ordinance passed by the Band on or about August 13, 1959. That ordinance was certified by the Secretary of the Interior as required by § 1161, and was published in the Federal Register on or about April 16, 1960. The ordinance remains in effect.

Respondent Eva Rehner is a member of the Pala Band. The outcome of the case will directly affect the Band's control

over the licensing and regulation of liquor establishments run by tribal members on the Reservation. It will also affect the ability of Respondent to earn a living. The Tribe has a legitimate interest in the economic well-being of its members. This interest is particularly strong, where, as here, a member's ability to earn a living is intertwined with the Band's governmental authority.

Summary of Argument

Since the early days of this nation, Congress has completely ousted states from regulation of liquor transactions with Indian people. United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876). Absent federal preemption, such regulation would have been a legitimate matter for inherent tribal sovereignty. Cf. Merrion v. Jicarilla Apache Tribe, ____ U.S. ____, 71 L.Ed.2d 21 (1982).

18 U.S.C. § 1161 granted Tribes the option to remove the federal prohibition against the introduction of liquor into Indian country and to regulate liquor sales and use in conformity with state law and under an ordinance approved by the Secretary of the Interior. United States v. Mazurie, 419 U.S. 544 (1975). Section 1161 granted no jurisdiction to states to impose state licensing or distribution requirements. Without specific federal authorization, state jurisdiction to license or regulate activity by Indians on the reservation does not exist. See, e.g. Bryan v. Itasca County, 426 U.S. 373, 377 (1976).

The Ninth Circuit's decision upholds the right of Indian tribes to license Reservation liquor sales, and to control those sales in conformity with state law. The Band, through its ordinance, has ex-

ercised that right. As a tribal government, it maintains licensing and primary enforcement authority. It is well-suited to do so, since its interests are direct and it has the administrative ability to carry out those functions. To equate tribal regulation with no regulation at all, as does the petitioner and its amici, denigrates tribal government and ignores the current Reservation situation.

Argument

Article I, § 8, cl 3 of the federal Constitution grants the Congress authority "To regulate commerce...with the Indian tribes." This power is broad in matters relating to alcohol in Indian country. United States v. Mazurie, 419 U.S. 544, 554-555 (1975); Perrin v. United States, 232 U.S. 478, 482 (1914). Congress has long occupied this field. See, e.g. United States v. Forty-Three Gallons of

Whiskey, 93 U.S. 188, 194 (1876). This comprehensive federal regulation itself precludes state jurisdiction; explicit preemption is not required. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144 (1980); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 689 (1965).

Absent historical federal preemption, the subject matter involved in this case would have been an appropriate matter for the exercise of inherent tribal sovereignty Merrion v. Jicarilla Apache Tribe, supra. What this Court said in upholding tribal taxing power in that case is equally applicable here "...it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction..." Id. at 29. Since Congress removed the barrier to the exercise of tribal sovereignty and dele-

gated to Tribes part of its own power to regulate such matters, United States v. Mazurie, supra at 557, the Band and the United States have jointly occupied the field to the exclusion of the States. This Court has repeatedly ruled that, in the absence of a federal statute specifically authorizing the states to license or tax certain activity by Indians on the reservation, the state cannot exercise such power. White Mountain Apache Tribe v. Bracker, supra; Ramah Navajo School Board v. New Mexico Bureau of Revenue, ____ U.S. ____, 73 L.Ed.2d 1174 (1982); Bryan v. Itasca County, 426 U.S. 373, 376-377 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-481 (1976); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 177-181 (1973). "The policy of leaving Indians free from state jurisdiction and control is deeply

rooted in the Nation's history." Rice v. Olsen, 324 U.S. 786, 789 (1945). In light of this policy, courts will not interpret a statute to grant States jurisdiction over Indians on reservations unless there is a clear and unambiguous expression of congressional intent to terminate Indian immunity from state law. Bryan v. Itasca County, supra, at 392-393. Doubtful expressions are resolved in favor of the Indians. Ibid.

18 U.S.C. § 1161 contains no expression of any intent to grant States jurisdiction over liquor transactions on Indian Reservations. The statute merely provides that federal criminal laws prohibiting the sale and possession of liquor in Indian country do not apply to any act or transaction that "is in conformity both with the laws of the State in which such act or transaction occurs

and with an ordinance duly adopted by the tribe having jurisdiction...." This provision was enacted to give individual tribes the option of retaining the existing federal prohibition against the introduction of liquor into "Indian country" or regulating liquor sales and use in conformity with state law and under an ordinance approved by the Secretary of the Interior. United States v. Mazurie, supra, at 547. The statute does not address the extension of state control over liquor transactions to Indian reservations. Instead, Section 1161 contemplates that state substantive standards concerning such matters as hours of sale or sale to minors will be incorporated by reference similar to incorporation of state law under the Assimilative Crimes Act. See 18 U.S.C. 13, 1152.

The statutory reference to state law defines an exemption from the federal prohibitions regarding the introduction of liquor into Indian country. If alcoholic beverages are sold on a reservation in violation of an applicable substantive state standard, the exemption provided in Section 1161 will not apply, and the offending parties will be subject to prosecution under one or more of the federal criminal provisions enumerated in Section 1161 (i.e. 18 U.S.C. 1154, 1156, 3113, 3488, 3618). See, e.g. United States v. Mazurie, supra. But Section 1161 evidences no intent to extend state jurisdiction or enforcement authority to the activities of Indians on the reservation.

The "in conformity with" language of § 1161 is much weaker than language found insufficient to subject the federal

government to state permit requirements in Hancock v. Train, 426 U.S. 167 (1976), and EPA v. State Water Resources Control Board, 426 U.S. 200 (1976). In those cases, this Court held that the Clean Air Amendments and the FWPCA Amendments do not authorize States to insist that federal air and water pollution control facilities obtain state operating permits, despite language requiring compliance by the federal government "to the same extent that any person is subject to such requirements." Citing principles of sovereignty as generally requiring non-interference by subordinate sovereigns the court stated: "We are unable to find in Section 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations

may not perform their activities unless a state official issues a permit." Id. at 179-180.

As the Court has recently observed, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980). There is no indication in the present case that Congress intended to allow states through the adoption of quota systems such as California's to effectively prevent Indian tribes from exercising the very option granted them by § 1161. The Court's more recent decision in California v. United States, 438 U.S. 645 (1978), acknowledged that state permit requirements govern the appropriation of water for federal water projects, but the Court reached that result against the unique backdrop of

federal deference to state water law. No such tradition of deference to the states exists where Indians and their activities on a reservation are concerned and especially in the context of liquor transactions on Indian Reservations. These matters have been historically under federal control.

Any interpretation of § 1161 allowing state licensing and regulatory jurisdiction would go directly against Congressional expression of support for tribal self-determination and economic self-sufficiency. See, e.g. Indian Reorganization Act, 25 U.S.C. § 461, Indian Self-Determination and Assistance Act, 25 U.S.C. § 450, et seq, and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451, et seq. See discussion in White Mountain Apache Tribe v. Bracker, supra, at 143, note 10. Section 1161 should be inter-

preted in light of this current strong federal policy. Bryan v. Itasca County, supra, at 386.

Pala, like most Indian tribes, suffers from high unemployment and generally lower income levels of its members. As a result, one of its major goals is to stimulate the Reservation economy, encourage jobs and income for tribal members, and remove wherever possible, economic barriers to reservation businesses, particularly those operated by tribal members. In recognition of those economic development needs, Pala has chosen not to impose a tribal fee for issuing liquor licenses to tribal members. Of course, if the purchase of a $55,000 state liquor license can be required of reservation sellers, those tribal goals will be directly frustrated. Certainly, most tribal members, including respondent,

cannot enter into the liquor business if they have to pay such a price to purchase a state liquor license. Economic self-sufficiency is vitally important to reservations, and has been strongly encouraged by the federal government. Allowing state licensing authority to be imposed on reservations, particularly when that licensing authority inherently involves a nearly insurmountable financial barrier to most tribal members, effectively frustrates both tribal government powers and authority and individual economic initiative. In addition, to the extent that such license fees operate as the equivalent of a tax on the privilege of selling liquor on the Reservation, they are clearly forbidden. White Mountain Apache Tribe v. Bracker, supra. This case presents an example of the mutual dislocation necessarily created

by dual regulatory schemes. Cf. Washington v. Confederated Tribes of Colville Indian Reservation, supra, at 158, 159.

Petitioner and amici argue adequate enforcement cannot be had by criminal prosecutions alone, but that the leverage of control over the license is needed. That leverage exists now, and the Band controls it, as is proper.

Conclusion

The decision of the Ninth Circuit Court of Appeals should be upheld.

Respectfully submitted,

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